

network elements – it cannot legally support a national finding on impairment generally, and therefore impairment should be determined on a market-by-market basis. Accordingly, the FCC delegated responsibility to the states for this analysis. *Id.* at ¶ 130. For some network elements, the FCC concluded that the record before it permitted a nationwide finding whether a particular network element should be unbundled. *Id.*

The element is used to compete against “qualifying service.”

In order for an ILEC to be required to unbundle any network element, requesting carriers must seek to use such element in order to compete against a “qualifying service” offered by the ILEC. *Id.* at ¶ 133. The FCC indicated that a “qualifying service” is one that has traditionally been the exclusive domain of an ILEC. *Id.* at ¶ 135. Such services include: (1) local exchange voice and data services, (2) digital subscriber line (DSL) services; and (3) high-capacity access services provided on a common carrier basis. *Id.* at ¶¶ 135 & 140. Once a requesting carrier obtains a UNE to provide a qualifying service, that element may be used to provide any other service, including information service. *Id.* at ¶ 143.

UNBUNDLING REQUIREMENTS FOR INDIVIDUAL NETWORK ELEMENTS.

A. Loops – Including Line Sharing.

In the *Triennial Review Order*, the FCC conducted separate analyses of impairment based on: (1) loop types – copper, fiber or hybrid (copper/fiber); (2) capacity levels – OCn loops,¹ dark fiber² loops, DS-3 loops, and DS-1 loops;³ and (3) customer

¹OCn refers to “Optical Carrier,” an optical interface designed to work with the synchronous transport signal (STS) rate in a synchronous optical network (SONET). “N” = 1, 3, 9, 12, 18, 24, 26, 48, 192 or 256. An OC-3, for example, is a SONET channel equal to three DS-3s (equal to 155.52 million bits per second (Mbps) capacity). *Newton’s Telecom Dictionary*, 605 (2000 Ed.).

²“Dark fiber” is optical fiber through which no light is transmitted and through which no signal is carried. It is unactivated, deployed fiber that is left dark, i.e., with no necessary equipment (such as opto-electronics or optronics) attached to light the fiber to carry a signal to serve customers. *Triennial Review Order*, at ¶ 201 n. 628, citing *Newton’s Telecom Dictionary*, 201 (2002 Ed.).

³DSn refers to “Digital Signal (level).” The terms refer to a hierarchy of digital signal speeds used to classify capacities of digital lines and trunks. A DS0 is the worldwide standard speed for digitizing one voice conversation; it has a standard speed (capacity) of 64,000 bits per second (i.e., 64 Kbps). A DS-1 can carry 24 DS-0s, and has a capacity of 1.544 million bits per second (i.e., 1.544 Mbps). A DS-3 can carry 3 DS-1s, and has a capacity of 454.736 Mbps. The highest DSn level is DS-4, which can carry 168 DS-1s, and has a capacity of 274.176 Mbps. *Newton’s Telecom Dictionary*, 281 (2000 Ed.).

classes – mass market, small enterprise, and large enterprise. *Triennial Review Order*, at ¶ 197. Generally speaking, the FCC required extensive unbundling of legacy copper loop facilities and more limited unbundling of next-generation, fiber-based networks.

(1) **Mass market loops.**

Copper loops. The FCC concluded that ILECs must unbundle stand-alone copper loops and subloops, whether existing or newly deployed, for the provision of either or both narrowband and broadband service, including copper loops conditioned to provide xDSL service. *Id.* at ¶¶ 211, 248-49 & 253-54.

The FCC also concluded that ILECs must permit “line splitting” on such loops. Line splitting allows one competitor to provide narrowband service while another provides broadband service over the same loop. *Id.* at ¶¶ 211, 251-52.

Subject to a three-year transition period, and a new grandfathering provision, ILECs are no longer required to provide “line sharing” on copper, mass market loops. *Triennial Review Order*, at ¶ 255. Line sharing allows the high frequency portion of the loop (HFPL) to be separately unbundled for the provision of broadband service. The FCC also declined to require unbundling of the low frequency portion of the loop. *Id.* at ¶ 270. New line sharing arrangements are subject to the three-year transition provisions established by the FCC. *Id.* at ¶¶ 264-65.

Hybrid copper/fiber loops. ILECs generally must unbundle the copper distribution portion of the loop, but need not unbundle the fiber feeder portion of the loop, to the extent that this portion is used to provide packetized service. *Id.* at ¶¶ 288-89.

Fiber-to-the-home (FTTH) loops. ILECs are generally not required to unbundle FTTH loops subject to one exception. Where an ILEC retires old copper loops and overbuilds those facilities with FTTH, the ILEC must unbundle access to a 64 Kbps transmission path for the provision of narrowband (*i.e.*, voice) service to that customer. *Id.* at ¶¶ 274, 276.

(2) **Enterprise Market Loops.**

OCn loops. The FCC concluded that no impairment exists, on a nationwide basis, for this network element and thus, ILECs are not required to unbundle this element. *Id.* at ¶¶ 202, 315.

Dark fiber loops. The FCC found impairment on a location-by-location basis and

delegated to state commissions the authority to make impairment findings based upon a "self-provisioning trigger" (*i.e.*, whether competitors self-deploy dark fiber at each location). *Id.* at ¶¶ 311, 314.

The "self-provisioning trigger" is met where a specific customer location is being served by two or more competitors who are unaffiliated with either each other, or the ILEC. The competitors must also use their own facilities, not facilities owned or controlled by the ILEC or the other competitor. *Triennial Review Order*, at ¶ 332.

DS-3 loops. The FCC found impairment on a location-by-location basis and delegated to state commissions the authority to make impairment findings based upon the above-described "self-provisioning trigger" and a "competitive wholesale facilities trigger." *Id.* at ¶¶ 202, 320-21.

The "competitive wholesale facilities trigger" is met where two or more unaffiliated competitors, unaffiliated with the ILEC, are offering alternative loop facilities to other competitors on a wholesale basis at the same capacity level. *Id.* at ¶ 337.

The FCC limited an ILEC's unbundling obligation to a total of two DS-3s per CLEC to any single customer location, on the grounds that three DS-3s circuits are equivalent to one OC-3, and OCn loops are conclusively not impaired. *Id.* at 324.

DS-1 loops. The FCC concluded that such loops are generally impaired and directed state commissions to make location-specific impairment determinations applying the "competitive wholesale facilities trigger." *Id.* at ¶¶ 202, 325-27.

Timing for state commission impairment determinations.

The FCC directed that state commissions complete their initial impairment reviews for enterprise dark fiber, DS-3 and DS-1 loops within nine months from October 2, 2003 (the effective date of the *Triennial Review Order*) – in other words, by July 2, 2004. *Id.* at ¶¶ 339, 830.

B. Local Circuit Switching.

In its *Triennial Review Order*, the FCC defined the local circuit switching element to encompass line-side and trunk-side facilities, plus the features, functions and capabilities of the switch, including the basic capabilities that are available to the ILEC's customers, such as telephone number, directory listing, dial tone, signaling, access to 911 and access to switch routing tables. *Triennial Review Order*, at ¶ 433. The end office

switching element includes all vertical features that the switch is capable of providing, including custom calling, CLASS features and Centrex service. *Id.*

(1) Mass Market Local Circuit Switching.

The FCC concluded that CLECs are impaired, on a nationwide basis, if denied access to local circuit switching in the provision of service to mass market customers. *Id.* at ¶¶ 419, 459. The FCC cited evidence of economic and operational barriers caused by the "hot cut" process (*i.e.*, the labor-intensive, coordinated transfer of a customer's line from the ILEC's switch to the CLEC's switch) in support of its finding. *Id.* at ¶¶ 465-475.

The FCC directed state commissions to assess impairment in the mass market for local circuit switching on a market-by-market basis and required states to use a granular definition of market in their analysis, taking into consideration CLEC customer locations and factors affecting competitors' ability to target each group of customers economically and efficiently. *Id.* at ¶¶ 486, 493-97.

In connection with their impairment analysis, state commissions are prohibited from defining the market to include the entire state. *Id.* at ¶ 495.

The FCC authorized state commissions to define mass market customers from enterprise customers, but where the previous switching "carve-out" was applicable (*i.e.*, density zone 1 of the top 50 metropolitan statistical areas (MSAs),⁴ the FCC indicated that the appropriate cut-off in separating mass market customers from enterprise customers will be four DS-0 lines, absent significant evidence to the contrary. *Id.* at ¶ 497.

In order to find that there is no impairment for local circuit switching, the FCC required state commissions to find either of two triggers met: (1) the self-provisioning trigger (*i.e.*, three or more carriers, unaffiliated with the ILEC or each other, serving mass market customers in a particular market using self-provisioned switches);⁵ and (2) the competitive wholesale facilities trigger (*i.e.*, two or more unaffiliated competitive wholesale suppliers of unbundled local switching in a given market). *Id.* at ¶¶ 498, 501, 504-05. If a state commission identifies an exceptional barrier to entry in a market, it may

⁴The FCC previously determined that ILECs that make EELs available are not obligated to provide unbundled local circuit switching to requesting carriers for serving customers with four or more DS-0 loops in such areas. *UNE Remand Order*, at ¶¶ 276-98.

⁵The "self-provisioning trigger" for local circuit switching is different from the "self-provisioning trigger" for enterprise local loops. For switching, three or more unaffiliated carriers are required, while for enterprise local loops the "self-provisioning trigger" requires only two or more unaffiliated carriers.

petition the FCC for a waiver of the self-provisioning trigger for the duration of the impairment. *Id.* at ¶ 503.

If neither the self-provisioning trigger, nor the competitive wholesale facilities trigger, is satisfied, the FCC directed state commissions to determine whether a market nevertheless allows self-provisioning of switching, taking into consideration evidence of actual competitive deployment of local switches, including consideration of operational and economic barriers to entry. *Id.* at ¶¶ 506-07.

The FCC directed state commissions to also consider: (1) the absence of sufficient collocation space in ILEC central offices; (2) ILECs' inability to provide cross-connections between two CLECs on a timely basis; (3) the cost of backhauling a circuit to a CLEC's distant switch from the customer's end office, especially where the end office serves low density areas; (4) loop provisioning problems other than the "hot cut" process; (5) whether entry would be economic using the most efficient technology available; (6) the impact of universal service payments and implicit support flows on a competitor's ability to serve a particular market; and (7) potential revenues. *Triennial Review Order*, at ¶¶ 508-20. State commissions may find no impairment if these, and other factors, demonstrate that self-provisioning of switches is feasible in a given market. *Id.* at ¶ 507.

If state commissions cannot reach a no impairment finding, the FCC directs them to consider whether a requesting carrier's impairment can be cured by a more limited unbundling rule, namely "rolling" (temporary) access to unbundled switching for a period of 90 days or more. *Id.* at ¶¶ 521-24. Where state commissions determine that rolling access would cure all relevant sources of impairment (for example, by allowing CLECs to aggregate customers in preparation for a batch cut-over), then the state commission must implement rolling access rather than permanent access to unbundled switching. *Id.* at ¶ 524.

Timing for state commission action.

Within nine months of the *Triennial Review Order*'s effective date (*i.e.*, by July 2, 2004), state commissions must either: (1) approve and implement a batch-cut process that will render the hot cut process more efficient and reduce hot cut costs, based on the FCC's impairment finding; or (2) issue detailed findings supporting a conclusion that current hot cut processes do not give rise to impairment in a particular market. *Triennial Review Order*, at ¶ 527.

(2) Enterprise Local Circuit Switching.

The FCC concluded that there are few barriers to deploying competitive switches to serve enterprise customers using loops at DS-1 and higher capacity. *Triennial Review Order*, at ¶ 451. Accordingly, the FCC concluded that there is no impairment and this element will not be required to be unbundled. *Id.*

Although the FCC concluded that this element need not be unbundled, it recognizes that a more granular analysis may reveal that CLECs are impaired absent unbundled access in a specific market for DS-1 or higher capacity enterprise customers. *Id.* at ¶¶ 454-55.

Time frame to rebut FCC's nationwide no impairment finding.

State commissions may file a petition seeking to rebut the FCC's nationwide determination within 90 days of the *Triennial Review Order*'s effective date – i.e., by December 31, 2003. *Id.* at ¶ 455.

(3) Transitioning customer base upon a finding of no impairment.

When unbundled local circuit switching is no longer available as a UNE, the FCC required ILECs and CLECs to jointly submit details of an orderly, non-disruptive transition plan to migrate the current, unbundled local switching customer base to an alternative service arrangement. *Id.* at ¶¶ 528-32.

Enterprise customer base.

Under the FCC's order, competitors must transfer their enterprise customers to an alternative arrangement within 90 days after the close of the 90-day period within which state commissions may petition the FCC to rebut the nationwide "no impairment" finding – i.e., by March 31, 2004. *Triennial Review Order*, at ¶ 532.

Mass market customer base.

If a state commission finds that there is no impairment in the mass market, after a more granular analysis, then CLECs must commit to an implementation plan with the appropriate ILEC within two months after the state commission's "no impairment finding." *Id.* at ¶ 532. CLECs may continue to request access to unbundled local switching for five months after the state commission's "no impairment" finding; however, requests thereafter are disallowed. *Id.*

C. Subloops for Multi-unit Premises and Network Interface Devices.

The FCC determined, on a national basis, that CLECs are impaired without access to unbundled subloops associated with accessing customer premises wiring at multi-unit premises (e.g., apartment buildings). *Id.* at ¶ 347. In connection with this finding, the FCC concluded that inside wire subloops and network interface devices (NIDs) must also be unbundled. *Id.* at ¶ 351. The FCC also clarified that no collocation requirements could be imposed by ILECs with respect to such subloops. *Id.* at ¶ 350. The FCC made no express provision for state commission findings rebutting its determination.

D. Dedicated Transport.

The FCC redefined dedicated transport in its *Triennial Review Order*, to mean “transmission facilities connecting [ILEC] switches and wire centers within a LATA.” *Id.* at ¶ 365.⁶ Accordingly, entrance facilities and dedicated transmission facilities that connect the ILEC’s network to that of a CLEC for purposes of backhauling traffic are no longer required to be offered as UNEs. *Id.* The FCC’s amended definition applies to all competitors, including wireless carriers. *Id.* at ¶ 368.

For purposes of applying its impairment analysis, the FCC divided dedicated transport elements, according to their capacity, into: (1) OCn, (2) dark fiber, (3) DS-3 and (4) DS-1, transport facilities. *Id.* at ¶¶ 376, 380-93.

OCn transport. The FCC concluded that competitors are not impaired on a national level without access to unbundled OCn transport or interface facilities and thus, such transport is not available as a UNE. *Id.* at ¶ 389.

Dark fiber transport. On a national level, the FCC found that competitors are impaired without access to unbundled dark fiber transport facilities. *Id.* at ¶ 381. Carriers requesting dark fiber transport must purchase and deploy any necessary electronics or collocation. *Id.* at ¶ 382. The FCC’s determination is subject to more granular analysis by state commissions. *Id.* at ¶¶ 384.

DS-3 transport. On a national level, the FCC found that competitors are impaired without access to unbundled DS-3 transport facilities. *Id.* at ¶ 386. However, the FCC limited the number of DS-3 transport circuits that a CLEC, or its affiliates, may obtain along a specific route to twelve. *Id.* at ¶ 388. As with dark fiber transport, the

⁶The FCC previously defined “dedicated transport” as ILEC “transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by [ILECs] or requesting telecommunications carriers, or between switches owned by [ILECs] or requesting telecommunications carriers.” *Local Competition 1st R&O*, at ¶ 440, *reaffirmed in UNE Remand Order*, at ¶¶ 322-23.

FCC's determination is subject to more granular analysis by state commissions. *Id.* at ¶¶ 387.

DS-1 transport. Likewise, the FCC found that competitors are impaired without access to unbundled DS-1 transport facilities on a national level, subject to more granular analysis by state commissions. *Id.* at ¶¶ 390, 392.

Timing for state commission action.

The FCC delegated authority to state commissions to analyze route-specific deployment of dark fiber, DS-3 and DS-1 facilities to determine whether CLECs are impaired without access to such facilities. *Id.* at ¶ 417. The FCC directed state commissions to complete their analysis of these dedicated transport facilities within nine months from the *Triennial Review Order's* effective date (*i.e.*, by July 2, 2004). *Id.*

If a state commission makes a "no impairment" finding for a particular route, ILECs will no longer be required to provide unbundled transport facilities along that route, subject to a transition schedule that must be established by the state commission. *Id.*

Analysis to be employed by state commissions.

As with local loops,, the FCC specified the "triggers" that state commissions must employ in making their impairment findings regarding dedicated transport. The FCC directed state commissions to employ two triggers to guide their route specific analysis: (1) the self-provisioning trigger, and (2) the competitive wholesale facilities trigger. *Id.* at ¶¶ 394, 399-01.

The self-provisioning trigger does not apply to DS-1 transport. *Id.* at ¶ 409. For dark fiber and DS-3 transport, this trigger is met where three or more competitors, affiliated with neither each other or the ILEC, have deployed such transport facilities along a specific route between a tandem office and a central office, regardless of whether these carriers make such transport available to other carriers.⁷ *Triennial Review Order*, at ¶¶ 405-08.

The competitive wholesale facilities trigger is met if competing carriers have available two or more alternative transport providers, unaffiliated with one another or the

⁷ Again, the self-provisioning trigger for this element is different from the trigger for enterprise loops, which requires the presence of only two unaffiliated competitors self-providing the loops.

ILEC, immediately capable and willing to provide transport at a specific capacity along a given route between ILEC switches or wire centers. *Id.* at ¶¶ 412-16.

E. Shared Transport.

The FCC defines “shared transport” to include transmission facilities shared by more than one carrier between end office switches, between end office switches and tandem switches, and between tandem switches in the ILEC’s network. *Triennial Review Order*, at ¶ 533.

In its order, the FCC concluded that, to the extent a requesting carrier is impaired without access to unbundled circuit switching, that carrier is likewise impaired without access to unbundled shared transport. *Id.* at ¶ 534. The FCC directed state commissions to include shared transport in their impairment analysis of circuit switching. *Id.*

F. Packet Switching.

The FCC defines “packet switching” capability as “routing or forwarding packets, frames, cells or other data units based on address or other routing information contained in the packets, frames, cells or other data units” along with the functions performed by DSL access multiplexers (DSLAMs). *Triennial Review Order*, at ¶ 535.

In the order, the FCC concluded that, on a national basis, CLECs are not impaired if packet switching, including routers and DSLAMs, is not unbundled. *Id.* at ¶ 537. Accordingly, packet switching is not a UNE that must be offered by ILECs.

G. Signaling Networks.

The FCC defines a signaling system as a system that facilitates the routing of telephone calls between switches and notes that such systems are necessary components of providing circuit-based telecommunications services. *Id.* at ¶ 542. The FCC noted that, in the United States, the telecommunications network employs out-of-band signaling, meaning that the signaling network is physically separate from a carrier’s voice network, utilizing the SS7 protocol. *Id.*

In its order, the FCC concluded that, to the extent competitors are impaired without access to unbundled circuit switching, they are likewise impaired without access to unbundled signaling networks. *Id.* at ¶ 544.

Although access to signaling systems may no longer be necessary, the FCC

reiterated that ILECs must provide for interconnection between their signaling networks and the signaling networks of alternative providers, upon request. *Id.* at ¶ 548.

H. Call-Related Databases.

The FCC identified call-related databases as “databases that are used in signaling networks for billing and collection, or for the transmission, routing or other provision of telecommunications service.” *Triennial Review Order*, at ¶ 549.

In its order, the FCC concluded that, to the extent CLECs are impaired without access to unbundled local circuit switching, they are likewise impaired without access to unbundled call-related databases. *Id.* at ¶ 551. However, even if state commissions make a “no impairment” finding for local circuit switching, ILECs’ 911 and E911 databases continue to be UNEs. *Id.* at ¶ 557.

I. Operations Support Systems (OSS).

The FCC retained its prior definition of OSS as consisting of five functions that are supported by an ILEC’s databases and information: pre-ordering (including access to loop qualification information), ordering, provisioning, maintenance and repair, and billing. *Id.* at ¶ 561.

In the *Triennial Review Order*, the FCC concluded that competitors are impaired, on a national basis, if not provided with access to ILECs’ OSS. *Id.* at ¶ 562. OSS therefore remains a UNE.

IV. SCOPE OF UNBUNDLING OBLIGATIONS.

A. Combinations of Network Elements.

The FCC retained its prior rules: (1) prohibiting ILECs from separating network elements that ordinarily are combined, except upon request; and (2) requiring ILECs to provide combinations of UNEs – including EELs – when requested by competitors, including performing the necessary functions to make such combinations available. *Triennial Review Order*, at ¶¶ 569, 573-75.

The FCC also reaffirmed its prohibition against ILECs imposing additional conditions restricting access to EELs and other UNE combinations. Thus, ILECs may not require competitors to purchase special access circuits in order to obtain EELs, for example. *Id.* at ¶¶ 577-78.

B. Elimination Of The Commingling Restriction On EELs.

In its order, the FCC eliminated its restriction on commingling on EELs, which prevented competitors from connecting a UNE or UNE combination with facilities or services obtained at wholesale from an ILEC (e.g., switched and special access services). *Id.* at ¶ 579. Thus, CLECs may connect EELs to special access circuits to provide both local and long distance services. *Id.*, and *Id.* at ¶ 584.

C. Service Eligibility Criteria For High-Capacity EELs.

The FCC adopted certain local service eligibility criteria applicable to carriers seeking to: (1) convert a special access circuit to a high-capacity EEL; (2) obtain a new, high-capacity EEL; or (3) obtain part of a high-capacity loop-transport combination at UNE pricing (*i.e.*, a commingled EEL).

Per the FCC's order, carriers seeking such elements must satisfy the following criteria: (1) possession of a state certificate of authority to provide local voice service; (2) possession of at least one local number assigned to each circuit and the ability to provide 911 or E911 capability to each circuit; (3) each circuit must terminate into a collocation arrangement at an ILEC central office within the same LATA as the customer premises; (4) each circuit must be served by an interconnection trunk in the same LATA as the customer premises and, for every 24 DS-1 EELs or equivalent, the requesting carrier must maintain at least one active DS-1 interconnection trunk for the meaningful exchange of local voice traffic; and (5) each circuit must be served by a Class 5 switch or other switch capable of providing local voice traffic. *Triennial Review Order*, at ¶ 597.

D. Modification Of Existing Network.

The FCC also concluded that ILECs should be required to make routine network modifications to unbundled transmission facilities used by requesting carriers where the transmission facility has already been constructed. *Id.* at ¶ 632. By "routine network modifications," the FCC explained that it meant that "[ILECs] must perform those activities that [ILECs] regularly undertake for their own customers." *Id.*

Such "routine network modifications" include rearranging or splicing of cable, attaching routine electronics to high-capacity loops (e.g., multiplexers, apparatus cases, and doublers), adding doublers or repeaters, adding equipment cases or smart jacks, installing a repeater shelf, adding a line card, and deploying a new multiplexer or reconfiguring an existing multiplexer. *Id.* at ¶¶ 634-35.

However, the FCC explained, "routine network modifications" did not include construction of new wires (*i.e.*, installation of new aerial or buried cable). *Id.* at ¶ 632.

Further, the FCC noted that its pricing rules provide ILECs with the opportunity to recover the cost of the routine network modifications required in its order. *Id.* at ¶ 640. Moreover, the FCC noted that state commissions have discretion regarding whether such costs should be recovered through non-recurring or recurring charges. *Id.*

The FCC's decision regarding modifications of the ILEC's network addressed the "no facilities," "no build" policy addressed by the parties in Verizon West Virginia Inc.'s Section 271 proceeding before the Commission (Case No. 02-0809-T-P).⁸

V. TRANSITION PERIOD FOR APPLICATION OF UNE RULES.

In the *Triennial Review Order*, the FCC acknowledged that its unbundling rules would not be self-executing but would be implemented largely through carriers' interconnection agreements. *Triennial Review Order*, at ¶ 700. The FCC declined to unilaterally modify existing interconnection agreements or intervene in the contract modification process to implement its new unbundling rules. *Id.* at ¶ 701.

However, the FCC provided guidance for carriers making necessary changes to their interconnection agreements in response to the *Triennial Review Order*. *Id.* at ¶ 702. Where interconnection agreements contain no change of law provisions to implement new FCC rules, the FCC requires parties to renegotiate their agreements to implement the new unbundling rules in accordance with the statutory timetable for interconnection negotiation and arbitration, set forth in Section 252 of the Act. *Triennial Review Order*, at ¶ 703. The *Triennial Review Order*'s effective date (*i.e.*, October 2, 2003), is deemed the request date for negotiations to amend existing interconnection agreements. *Id.*

For parties to interconnection agreements containing change of law provisions, the FCC indicated that it expected the change of law process to implement the new unbundling rules would begin promptly and that parties would not delay such negotiations until the FCC's new rules become final and unappealable. *Id.* at ¶ 704.

VI. SUMMARY OF MATTERS REQUIRING COMMISSION ACTION.

As set forth herein, the FCC's *Triennial Review Order* requires, or warrants,

⁸See, e.g., "Commission Order," *Verizon-WV*, Case No. 02-0809-T-P, Findings of Fact Nos. 55-62 (Jan. 9, 2003).

Commission action to implement the new unbundling requirements set forth in that order. CAD provided the following table summary of the issues that must be addressed by the Commission, and the time frames within which Commission action is required:

Network Element	FCC Finding	Commission Action	Time Frame
Loops			
Mass Market: Stand alone copper loops and subloops	Impaired (must unbundle)	None	
Mass Market: Hybrid copper/fiber loops	Impaired (must unbundle)	None	
Mass Market: Fiber to the home (FTTH) loops	Not impaired (unbundle narrowband only if ILEC overbuilds)	None	
Enterprise: OCn loops.	Not impaired (no unbundling)	None	
Enterprise: Dark fiber, DS-3 (up to 2 circuits per customer), DS-1 loops	Impaired on location-specific basis determined by states (must unbundle unless state determines otherwise)	Make location specific determinations using either or both "self- provisioning" & "competitive wholesale facilities" trigger	9 months from TRO effective date = 7/2/04
Subloops for multi-unit premises & NIDs	Impaired	None	
Dedicated Transport			
OCn facilities	Not impaired	None	

Dark fiber, DS-3 (up to 12 circuits) and DS-1 facilities	Impaired on location-specific basis determined by states	Analyze route- specific deployment of facilities (if no impairment finding results, establish a transition schedule)	9 months from TRO effective date = 7/2/04
Shared Transport	Impaired only if the competitor is impaired without access to local circuit switching	See local circuit switching.	
Local Circuit Switching			
Enterprise: DS-1 & higher loops	Not impaired, but states may petition for waiver of no impairment finding for particular local markets	May file petition w/ FCC seeking to rebut nationwide determination	90 days from TRO effective date = 12/31/03
Mass Market:	Impaired on location-specific basis determined by states	Either (1) conclude that current hot cuts process cause no impairment or (2) approve & implement a batch- cut process	9 months from TRO effective date = 7/2/04
Packet Switching	Not impaired	None	
Signaling Networks	Impaired only if the competitor is impaired without access to local circuit switching	See local circuit switching	

Call-related Databases (excluding 911/E911)	Impaired only if the competitor is impaired without access to local circuit switching	See local circuit switching	
911/E911 Databases	Impaired	None	
OSS Functions	Impaired	None	
EELs	Available to the extent the requested loop-transport elements are unbundled		

VII. CAD'S PROPOSAL FOR FURTHER COMMISSION PROCEEDINGS.

As demonstrated by CAD's summary, the *Triennial Review Order* sets forth a very compressed schedule for state commission determinations if any of the FCC's impairment findings are going to be challenged. However, many of the determinations that the FCC delegated to state commissions will not need to be addressed unless a carrier wishes to challenge the FCC's impairment decisions.

CAD opined that it is reasonable to expect that only ILECs are likely to challenge the FCC's impairment findings on such issues as mass market local switching and dedicated transport for dark fiber, DS-3 and DS-1 facilities. Similarly, it is reasonable to expect that only CLECs are likely to challenge the FCC's finding that enterprise local circuit switching for DS-1 and higher capacity facilities is not impaired. Moreover, any challenges to the FCC's determinations will likely be mounted with respect to specific markets or routes rather than the entire state.

CAD believes that many of the FCC's determinations will not be the subject of challenge in West Virginia. However, to the extent a carrier intends to challenge any particular finding, those carriers should be directed to provide notice of that intent, quickly, in order to allow the Commission to begin work on the issue(s) raised.

CAD went on to state that even if the FCC's impairment decisions are not the subject of any carrier's challenge, the Commission will need to address at least two major

issues: (1) the establishment of a batch hot-cut process for mass market local circuit switching, something required if the FCC's impairment finding stands; and (2) implementation of the FCC's rejection of ILECs' "no facilities, no build" policies. The first determination is subject to the nine-month time frame established by the FCC. The second determination is not required to be made within the FCC's nine-month time frame but, as noted during Verizon-WV's Section 271 proceeding, is an important issue that affects CLEC operations in the state.

Accordingly, CAD recommended that the Commission adopt the following procedures for implementing its obligations under the *Triennial Review Order*:

- a. Send a copy of CAD's petition, and any Commission order initiating a general investigation based on this petition, to all ILECs and each facilities-based CLEC operating in West Virginia.⁹
- b. Direct that each facilities-based CLEC file a notice with the Commission, within ten (10) days following issuance of the Commission's order, advising whether the carrier intends to challenge the FCC's no impairment determination with respect to enterprise local circuit switching for DS-1 and higher capacity facilities. If a carrier indicates that it intends to challenge the FCC's determination, it shall include in its notice a statement identifying each particular market in which it seeks to challenge the FCC's determination. In addition, the challenging carrier shall include a proposed procedural schedule for resolving its challenge on the merits, including proposed dates for the submission of any evidence in support of its challenge, submission of any rebutting evidence, discovery cut-offs, and proposed hearing dates and procedures regarding the submission of testimony.
- c. Establish a *Triennial Review Order* implementation collaborative (TRIC) – consisting of the aforesaid ILECs, facilities-based CLECs operating in West Virginia, Commission Staff and CAD and direct the TRIC to do the following:
 - (1) Conduct its first meeting within fifteen (15) days of the issuance of

⁹Based on the record in Verizon-WV's Section 271 proceeding, CAD believes that the following CLECs are operating on a facilities basis in West Virginia: FiberNet, LLC; Gateway Telecom, LLC, dba StratusWave; NTELOS, Inc.; MCImetro Access Transmission Services, LLC; ComScape Communications; Hardy Telecommunications, Inc.

this order.

- (2) At this first meeting, establish recommendations regarding the procedure whereby ILECs may challenge the FCC's impairment decisions that were delegated to state commissions, as well as a procedural schedule for addressing the issues relevant to such impairment analyses (*e.g.*, definition of relevant market, identification of specific routes under challenge).
 - (3) At this first meeting, establish recommendations regarding the procedure the Commission should adopt in addressing the batch hot-cut process for mass market local circuit switching contemplated by the FCC.
 - (4) At this first meeting, establish recommendations regarding the procedure the Commission should adopt in addressing the FCC's decision invalidating the "no facilities, no build" policy employed by Verizon-WV (addressed in Verizon-WV's Section 271 proceeding) and similar policies employed by any other ILECs in the state.
 - (5) Identify any other issues that should be addressed by the TRIC in conjunction with the duties delegated to the Commission by the FCC, and propose a procedural schedule for addressing such issues.
- d. Cause a copy of the Commission's order to be published once, in a newspaper of general circulation statewide, and establish a link on the Commission's website to proceedings in this docket.
 - e. Establish such further requirements as the Commission deems reasonable and appropriate.

On September 19, 2003, Commission Staff filed an Initial Joint Staff Memorandum concurring with CAD's recommendations and suggesting that CAD be appointed to chair the TRIC. Staff indicated that it would file a further recommendation upon the completion of its investigation.

DISCUSSION

Upon review of the foregoing, the Commission finds it reasonable and appropriate

to institute this general investigation and follow the recommendations as to case processing that have been recommended by the CAD and Staff.

FINDING OF FACT

The FCC has issued its *Triennial Review Order* which require certain Commission actions upon challenge of FCC impairment determinations by CLECs or ILECs. The *Triennial Review Order* also requires Commission determinations that are not dependent upon such a challenge.

CONCLUSIONS OF LAW

It is appropriate that the Commission institute this general investigation and make further requirements as contained in the ordering paragraphs.

ORDER

IT IS THEREFORE ORDERED that this general investigation is hereby instituted, and the style of this case is hereby changed from "PC" to "GI."

IT IS FURTHER ORDERED that each facilities-based CLEC operating in West Virginia file a notice with the Commission, within ten (10) days following issuance of this Order, advising whether the carrier intends to challenge the FCC's no impairment determination with respect to enterprise local circuit switching for DS-1 and higher capacity facilities. If a carrier indicates that it intends to challenge the FCC's determination, it shall include in its notice a statement identifying each particular market in which it seeks to challenge the FCC's determination. In addition, the challenging carrier shall include a proposed procedural schedule for resolving its challenge on the merits, including proposed dates for the submission of any evidence in support of its challenge, submission of any rebutting evidence, discovery cut-offs, and proposed hearing dates and procedures regarding the submission of testimony.

IT IS FURTHER ORDERED that a *Triennial Review Order* implementation collaborative (TRIC) – consisting of the aforesaid ILECs, facilities-based CLECs operating in West Virginia, Commission Staff and CAD is hereby created.

IT IS FURTHER ORDERED that the CAD shall chair the TRIC.

IT IS FURTHER ORDERED that the TRIC shall:

- (1) Conduct its first meeting within fifteen (15) days of the issuance of this Order.
- (2) At this first meeting, establish recommendations regarding the procedure whereby ILECs may challenge the FCC's impairment decisions that were delegated to state commissions, as well as a procedural schedule for addressing the issues relevant to such impairment analyses (*e.g.*, definition of relevant market, identification of specific routes under challenge).
- (3) At this first meeting, establish recommendations regarding the procedure the Commission should adopt in addressing the batch hot-cut process for mass market local circuit switching contemplated by the FCC.
- (4) At this first meeting, establish recommendations regarding the procedure the Commission should adopt in addressing the FCC's decision invalidating the "no facilities, no build" policy employed by Verizon-WV (addressed in Verizon-WV's Section 271 proceeding) and similar policies employed by any other ILECs in the state.
- (5) Identify any other issues that should be addressed by the TRIC in conjunction with the duties delegated to the Commission by the FCC, and propose a procedural schedule for addressing such issues.

IT IS FURTHER ORDERED that within thirty (30) days of the date of this Order, the TRIC shall file with the Commission its initial recommendations and status report.

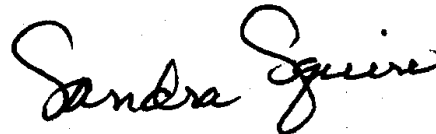
IT IS FURTHER ORDERED that the Commission's Executive Secretary shall cause a copy of the notice attached hereto as Attachment A, to be published once, in a newspaper of general circulation statewide.

IT IS FURTHER ORDERED that the Commission Executive Secretary shall establish an electronic link on the Commission's website to selected proceedings in this docket.

IT IS FURTHER ORDERED that the Commission's Executive Secretary shall serve a copy of this order on all ILECs and each facilities-based CLEC operating in West Virginia and upon all parties of record by First Class United States Mail, and upon Commission Staff by hand delivery.

JML/ljm
031507c.wpd

A True Copy, Teste:

A handwritten signature in cursive script that reads "Sandra Squire".

Sandra Squire
Executive Secretary

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

CASE NO. 03-1507-T-GI

**GENERAL INVESTIGATION REGARDING
IMPLEMENTATION OF FCC UNBUNDLING
REQUIREMENTS IN TRIENNIAL REVIEW ORDER**

NOTICE OF GENERAL INVESTIGATION

By Order issued September 24, 2003, the Public Service Commission granted a petition filed by the Commission's Consumer Advocate Division, to institute a general investigation of implementation of Federal Communications Commission (FCC) telecommunications services unbundling requirements as set forth in the FCC's *Triennial Review Order* pertaining to incumbent and competitive local exchange telecommunications carriers. The FCC's *Triennial Review Order* was issued August 21, 2003, and becomes effective October 2, 2003. The FCC delegated many impairment determinations to state commissions. Commission action is required with respect to certain of the FCC's findings, by dates certain.

The Commission's Order was served on all facilities-based competitive local exchange carriers (CLECs) and incumbent local exchange carriers (ILECs) operating in West Virginia. Those entities have an opportunity to challenge particular FCC findings contained in the *Triennial Review Order*. The Order required each facilities-based CLEC to file a notice with the Commission, within 10 days following issuance of this Order, advising whether the carrier intends to challenge the FCC's no impairment determination with respect to enterprise local circuit switching for DS-1 and higher capacity facilities.

The Commission's Order also established a collaborative of ILECs, CLECs, Commission Staff and the Consumer Advocate Division to make recommendations to the Commission as to how to fulfill the duties delegated to the Commission by the FCC. Interested entities may request a copy of the Consumer Advocate's petition, the Commission's September 24, 2003, Order, and any other filings in this case, by filing a written request with Executive Secretary, West Virginia Public Service Commission, P.O. Box 812, Charleston, WV 25323. Persons wishing to participate as parties to this case should file a petition to intervene, in compliance with Rule 12.6. of the Commission's Rules of Practice and Procedure, 150 CSR 1, within 30 days of this publication. All

filings should reference the case number above.



CONSUMER ADVOCATE DIVISION
STATE OF WEST VIRGINIA
PUBLIC SERVICE COMMISSION
700 Union Building
723 Kanawha Boulevard, East
Charleston, West Virginia 25301
(304) 558-0526

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03 OCT 29 PM 3:35
WV PUBLIC SERVICE COMM.
LEGAL DIVISION

October 29, 2003

Sandra Squire
Executive Secretary
Public Service Commission of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

RE: CASE NO. 03-1507-T-PC, GENERAL INVESTIGATION REGARDING
IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS
COMMISSION'S UNBUNDLING REQUIREMENTS IN ITS *TRIENNIAL*
REVIEW ORDER

Dear Ms. Squire:

Enclosed is an original and 12 copies of the *"Initial Report and Recommendations of the Triennial Review Order Implementation Collaborative"* for filing in this matter.

Very truly yours,

PATRICK W. PEARLMAN
WV State Bar No. 5575

PWP/cs
Enclosure
cc: All parties

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

RECEIVED

03 OCT 29 PM 3:35

WEST VIRGINIA PUBLIC SERVICE COMM.
LEGAL DIVISION

CASE NO. 03-1507-T-GI

GENERAL INVESTIGATION REGARDING
IMPLEMENTATION OF FCC UNBUNDLING
REQUIREMENTS IN *TRIENNIAL REVIEW ORDER*

**INITIAL REPORT AND RECOMMENDATIONS OF THE *TRIENNIAL
REVIEW ORDER* IMPLEMENTATION COLLABORATIVE**

By order entered September 24, 2003, the Commission granted a petition filed by the Consumer Advocate Division ("CAD"), establishing a general investigation regarding implementation of the Federal Communications Commission's ("FCC") unbundling requirements set forth in its "Report and Order," *I/M/O Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket 01-338, FCC 03-36 (Rel. Aug. 21, 2003) ("*Triennial Review Order*"). Among other things, the Commission adopted CAD's recommendations regarding the establishment of a Triennial Review Order implementation collaborative ("TRIC") to assist the Commission in implementing the *Triennial Review Order's* requirements. The TRIC was directed to meet within 15 days of the Commission's order and to address a number of issues specified by the Commission.

Pursuant to the Commission's order, the TRIC hereby submits its initial report and recommendations regarding the issues set forth in that order.

PROCEDURAL MATTERS

The initial meeting of the TRIC was held on October 8, 2003. The following parties, and their representatives were as follows: AT&T Communications of West Virginia, Inc. ("AT&T") – Robert R. Rodecker, Mark A. Keffer, Robert Kirchberger; Citizens Telecommunications Company of West Virginia, Inc., dba Frontier Communications of West Virginia ("Frontier-WV") – Mike Swatts; Commission Staff ("Staff") – Dannie L. Walker and Christopher Howard; CAD – Patrick W. Pearlman and Billy Jack Gregg; FiberNet, LLC ("FiberNet") – Steve Hamula; Gateway Telecommunications, LLC dba StratusWave ("StratusWave") – Libby Reasbeck; MCImetro Access Transmission Services, LLC ("MCI") – Andrew Zettle; NTELOS – Steve Goodman; Sprint Communications Company, L.P. ("Sprint") – Jennifer A. Duane; Verizon West Virginia Inc. ("Verizon-WV") – Joseph J. Starsick and Kathy Buckley. Patrick Pearlman chaired the meeting. A copy of the agenda for the TRIC's initial meeting is attached as Appendix A. TRIC members discussed all issues set forth in the agenda.

RECOMMENDATIONS.

1. Ninety-Day Proceedings Related to the FCC's "No Impairment" Determination.

The TRIC first addressed whether any competitive local exchange carrier ("CLEC") filed a petition with the Commission, seeking to rebut the FCC's "no impairment" determination for enterprise local circuit switching for DS-1 and higher capacity facilities, by the deadline for filing such petitions established in the Commission's September 24, 2003,